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A

Tan Sri William Cheng Heng Jem & Anor (suing as the President and Deputy President of the Associated Chinese Chambers of Commerce and Industry of Malaysia, and for and on its behalf) v Tan Sri Ngan Ching Wen & Ors

B

HIGH COURT (KUALA LUMPUR) — SUIT NO D9–22–1853 OF 2008
LIM YEE LAN J
25 MAY 2012

C

Equity — Property, equitable interest in — Land — Whether resulting trust created over land — Whether land held on trust for Associated Chinese Chambers of Commerce and Industry of Malaysia ('ACCCIM') — Purchase of land by company set up by ACCCIM — Whether caveat entered by ACCCIM — Whether allegation of trust inconsistent with undisputed contemporaneous documents and ACCCIM's conduct

D

E

Land Law — Indefeasibility of title and interests — Resulting trust — Whether land held on trust for Associated Chinese Chambers of Commerce and Industry of Malaysia ('ACCCIM') — Whether caveat entered by ACCCIM — Allegation of trust inconsistent with undisputed contemporaneous documents and ACCCIM's conduct — No monetary contribution by ACCCIM — Whether resulting trust arose — Registration — Torrens system — Primary and secondary registration — Effect of primary and secondary registration

F

Land Law — Trusts — Trust incapable of registration — Whether trust may be protected by entry of caveat — Whether resulting trust arose

G

Trusts and Trustees — Land — Whether trust created over land — Whether land held on trust for Associated Chinese Chambers of Commerce and Industry of Malaysia ('ACCCIM') — Whether caveat entered by ACCCIM — Allegation of trust inconsistent with undisputed contemporaneous documents and ACCCIM's conduct — Whether resulting trust arose

H

Trusts and Trustees — Resulting trust — Whether sufficient evidence of intention to create resulting trust — Whether land held on trust for Associated Chinese Chambers of Commerce and Industry of Malaysia ('ACCCIM') — Whether caveat entered by ACCCIM — Allegation of trust inconsistent with undisputed contemporaneous documents and ACCCIM's conduct

I

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The plaintiff ('ACCCIM') at its meeting on 18 May 1979 received a proposal for the establishment by ACCCIM of a RM100m Chinese Economic Development Fund ('the Fund'). Pursuant to this a company ('D7') was registered to raise funds for the fund and to involve in various major business activities. ACCCIM played the role of promoter in the launching of the fund. Tan Sri Wee Boon Ping ('Wee'), the then President of ACCCIM requested the Sabah State Government to allocate to ACCCIM 20,000 acres of land in Sabah at a premium of RM50 per acre for the purposes of developing it into an oil palm plantation. The Sabah Chief Minister responded favourably to Wee's request and suggested to Wee that a Sabah State agency like Koperasi Pembangunan Desa ('KPD') should also be involved in the business venture with ACCCIM. Hence, D8 was incorporated as a private limited company to implement the project between ACCCIM and KPD. D8 was initially a wholly owned subsidiary of D7. The Sabah State Government then agreed to alienate certain lands to KPD for the purpose of implementing the joint venture project between KPD and ACCCIM. As part of the joint venture basis the lands were alienated to and registered in the name of D8 instead of KPD. The paid up capital of D8 was increased and D8 became 49% owned by KPD and 51% owned by D7. Subsequently, D7 invited the public to subscribe its shares for the purposes of developing the lands. ACCCIM applied and was allotted 250,000 ordinary shares in D7. Later D7 acquired all the shares held by KPD in D8 and D8 became a wholly-owned subsidiary of D7. ACCCIM then disposed of all its shares in D7. D8 was later converted into a public limited company. In this action ACCCIM sought, inter alia, declarations that the lands were held in trust by D8 on behalf of ACCCIM.

Held, dismissing the claim with costs:

(1) Under the Torrens system of land registration, there are two main types of registration, namely, the primary and secondary registration. The primary registration focuses on the registration of a first or original title in respect of state or crown land that has been approved for alienation or in respect of formerly unregistered land that has been brought under the Torrens system, while the secondary registration deals with the state's registration of instruments of dealing in alienated land in statutorily prescribed forms. A primary registration provides conclusive evidence that registration has taken place and the particulars of registration have been truly recorded and which no court is allowed to question. A primary registration of a first Torrens title upon alienation grants to the registered owner a title that is immediately indefeasible (see paras 18–19 & 24); *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 referred.

(2) The registration of the title in the lands in D8's name by the Sabah State Authority pursuant to the Sabah Land Ordinance ('SLO') vested conclusively in D8 the legal and beneficial ownership in the lands which

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was immediately indefeasible against the whole world. Such a title upon registration cannot be questioned by any one and the court cannot go behind such a registered title to enquire or investigate as to the pre-registration arrangement between D8 and ACCCIM or as to the actual intention of the Sabah State Authority when alienating the lands to D8 (see paras 28–29); *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 referred.

(3) Under the Torrens system of land registration, a trust is an unregistered unregistrable interest that exists only outside the Torrens system. Thus, an 'interest' created under a trust is incapable of registration. This is based on the Torrens principle that a trust document cannot be registered and can only exist off the Torrens register. Nevertheless such an unregistered unregistrable interest can be protected against a subsequent registered statutory title or encumbrance that is being acquired by a bona fide purchaser for good value, by the entry of a protective device (caveat) (see paras 34–35); *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (FC) referred.

(4) The only way ACCCIM could get its trust in the lands recognised and protected under the SLO was by the entry of a caveat under s 116 of the SLO subsequent to its registration in D8's name (see para 36).

(5) ACCCIM's allegation of a trust in its favour in respect of the Sabah land was wholly inconsistent with undisputed contemporaneous documents, ACCCIM's own conduct and statements and the circumstantial evidence available. Even if a trust did exist in favour of ACCCIM over the lands immediately upon its alienation, such a trust had been extinguished or lost or given up by ACCCIM through larches, acquiescence or was time-barred under s 22(2) of the Limitation Act 1953 (see paras 44–45).

(6) ACCCIM's actions (or lack thereof) were wholly inconsistent with such a claim. In this regard, ACCCIM was estopped from contending otherwise (see para 48); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 referred.

(7) The consideration for the alienation of the lands were paid either by D7 or D8. ACCCIM also did not contribute any money towards the development and cultivation of the lands. Any declaration of such a trust over the lands in favour of ACCCIM would be inequitable and unjust to D8, D8's shareholders and financiers and would result in unjust enrichment on the part of ACCCIM (see paras 63 & 66).

[Bahasa Malaysia summary

Plaintif ('ACCCIM') di perjumpaannya pada 18 Mei 1979 menerima satu cadangan untuk penubuhan RM1 juta Dana Pembangunan Ekonomi Cina ('Dana') oleh ACCIM. Berikutan itu, satu syarikat ('D7') telah didaftarkan

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untuk mengumpul wang untuk dana tersebut dan untuk terlibat dalam pelbagai aktiviti perniagaan. ACCCIM memainkan peranan sebagai penganjur pada pelancaran dana tersebut. Tan Sri Wee Boon Ping ('Wee'), yang merupakan Presiden ACCCIM pada ketika itu meminta Kerajaan Negeri Sabah untuk memperuntukkan 20,000 ekar tanah di Sabah pada premium RM50 setiap ekar kepada ACCCIM bagi tujuan membangunkan tanah tersebut kepada ladang kelapa sawit. Menteri Besar Sabah telah memberi reaksi menyokong permintaan Wee tersebut dan mencadangkan kepada Wee bahawa sebuah agensi Negeri Sabah seperti Koperasi Pembangunan Desa ('KPD') seharusnya terlibat sama dalam usaha perniagaan dengan ACCCIM. Oleh itu, D8 ditubuhkan sebagai satu syarikat sendirian berhad untuk menjalankan projek di antara ACCCIM dan KPD. D8 pada mulanya merupakan sebuah subsidiari milikan penuh D7. Kerajaan Negeri Sabah kemudiannya bersetuju untuk memberi milik beberapa bidang tanah kepada KPD bagi tujuan menjalankan projek usahasama di antara KPD dan ACCCIM. Sebagai sebahagian daripada asas usahasama, tanah-tanah tersebut sebaliknya diberi milik kepada dan didaftarkan atas nama D8 daripada KPD. Modal berbayar D8 bertambah dan D8 menjadi 49% dimiliki oleh KPD dan 51% dimiliki oleh D7. Sehubungan dengan ini, D7 menjemput orang awam untuk membeli saham-sahamnya bagi tujuan membangunkan tanah-tanah tersebut. ACCCIM memohon dan diberikan 250,000 saham-saham biasa dalam D7. Kemudiannya D7 memperolehi semua saham-saham yang dipegang oleh KPD dalam D8 dan D8 menjadi sebuah subsidiari milikan penuh kepada D7. ACCCIM kemudiannya menjual kesemua saham-sahamnya dalam D7. D8 kemudiannya diubah kepada sebuah syarikat awam berhad. Dalam tindakan ini ACCCIM memohon, antara lainnya, deklarasi-deklarasi bahawa tanah-tanah yang dipegang dalam amanah oleh D8 ialah bagi pihak ACCCIM.

Diputuskan, menolak tuntutan dengan kos:

(1) Di bawah pendaftaran tanah mengikut sistem Torrens, terdapat dua jenis pendaftaran utama iaitu; pendaftaran utama dan kedua. Pendaftaran utama memfokuskan pada pendaftaran hak milik pertama atau asal berhubung tanah negeri atau kepunyaan raja yang telah diluluskan untuk pemberimilikan atau berkenaan dengan tanah yang dahulunya tidak berdaftar yang terangkum di bawah sistem Torrens, manakala pendaftaran kedua, bertindak terhadap instrumen-instrumen pendaftaran negeri ke atas tanah beri milik dalam borang-borang yang ditetapkan secara statutori. Pendaftaran utama memberikan keterangan muktamad bahawa pendaftaran telah berlaku dan butiran-butiran pendaftaran telah benar-benar direkodkan yang mana mahkamah tidak dibenarkan untuk mempersoalkannya. Pendaftaran utama hak milik pertama Torrens selepas pemberimilikan memberikan hak milik yang

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tidak boleh disangkal kepada pemilik berdaftar (lihat perenggan 18–19 & 24); *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 dirujuk.

(2) Pendaftaran hak milik tanah-tanah atas nama D8 oleh Pihak Berkuasa Negeri Sabah menurut s 48/57 Ordinan Tanah Sabah ('OTS') meletakkan milikan sah dan benefisial ke atas tanah-tanah kepada D8 secara muktamad, yang serta-merta menjadikannya tidak boleh disangkal di seluruh dunia. Hak milik tersebut selepas didaftarkan tidak boleh dipersoalkan oleh sesiapapun dan mahkamah tidak boleh membelakangi hak milik berdaftar tersebut untuk menyoal atau menyiasat mengenai aturan pra-pendaftaran antara D8 dan ACCCIM atau mengenai tujuan sebenar Pihak Berkuasa Negeri Sabah semasa memberi milik tanah-tanah kepada D8 (lihat perenggan 28–29); *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 dirujuk.

(3) Di bawah sistem pendaftaran tanah Torrens, amanah merupakan kepentingan tidak berdaftar yang tidak boleh didaftarkan dan hanya wujud di luar sistem Torrens. Oleh itu, satu 'kepentingan' yang terhasil di bawah satu amanah tidak boleh didaftarkan. Ini berdasarkan prinsip Torrens iaitu satu dokumen amanah tidak boleh didaftarkan dan hanya wujud di luar pendaftaran Torrens. Namun begitu, kepentingan tidak berdaftar yang tidak boleh didaftarkan boleh dilindungi daripada satu hakmilik statutori berdaftar berikutnya atau bebanan yang diperolehi melalui pembeli bona fide untuk nilai, dengan memasukkan alat perlindungan (kaveat) (lihat perenggan 34–35); *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (MP) dirujuk.

(4) Satu-satunya cara ACCCIM boleh mendapatkan amanah dalam tanah-tanah tersebut diakui dan dilindungi di bawah OTS ialah melalui pendaftaran kaveat di bawah s 116 OTS selepas pendaftaran nama D8 (lihat perenggan 36).

(5) Dakwaan berhubung tanah Sabah merupakan satu amanah bagi pihak ACCCIM adalah tidak konsisten sepenuhnya dengan perjanjian semasa tidak dipertikai, tindakan ACCCIM sendiri dan penyataan-penyataan dan keterangan persekitaran yang ada. Malah sekiranya satu amanah wujud bagi pihak ACCCIM terhadap tanah-tanah tersebut sebaik sahaja pemberimilikan, amanah tersebut telah terhapus atau hilang atau diserahkan oleh ACCCIM melalui kealpaan, persetujuan atau dihalang oleh masa di bawah s 22(2) Akta Had Masa 1953 (lihat perenggan 44–45).

(6) Tindakan-tindakan ACCCIM (atau kekurangan tindakan) adalah tidak konsisten sepenuhnya dengan tuntutan tersebut. Berikutan ini,

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ACCCIM diestop daripada mencabar sebaliknya (lihat perenggan 48): *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 dirujuk.

(7) Balasan untuk pemberimilikan tanah-tanah tersebut dibayar oleh D7 atau D8. ACCCIM juga tidak menyumbangkan wang terhadap pembangunan dan pengusahaan tanah-tanah tersebut. Sebarang deklarasi seperti amanah ke atas tanah-tanah tersebut bagi pihak ACCCIM adalah tidak saksama dan adil kepada D8, pemegang saham-pemegang saham dan pembiaya-pembiaya D8 dan akan mengakibatkan pengayaan tak patut bagi pihak ACCCIM (lihat perenggan 63 & 66).]

Notes

For a case on whether trust created over land, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2762.

For cases on land, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3076–3081.

For cases on resulting trust, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3575–3581.

For cases on whether sufficient evidence of intention to create resulting trust, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2869–2872.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (folld)

Banner Homes Group PLC v Luff Development Ltd [2000] 2 All ER 117, CA (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Choong Kwee Sang v Choong Kwee Keong (as the executor of the estate of Chan Fook Lon, deceased) [2009] 1 MLJ 186, CA (refd)

Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752, Ch D (refd)

Eves v Eves [1975] 1 WLR 1338, CA (refd)

Foss v Harbottle (1843) 67 ER 189 (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (refd)

Izzap Limited v Yeoh Jin Beng & Ors (D8–22–111–2011, unreported, 5 January 2011) (refd)

Law Kam Loy and Anor v Boltex Sdn Bhd and Others [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

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Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
Macaura v Northern Assurance Co Ltd [1925] AC 619, HL (refd)
McCormick v Grogan (1869) LR 4 HL 82, HL (refd)
Muschinski v Dodds (1985) 62 ALR 429, HC (refd)
New Zealand Netherlands Society 'Oranje' Inc v Kuys [1973] 1 WLR 1126, PC (refd)
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159, PC (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)
Pallant v Morgan [1952] 2 All ER 951; [1953] Ch 43, Ch D (refd)
Paragon Finance plc v Thakerar & Co (a firm) [1999] 1 All ER 400, CA (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97, CA (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (refd)
Rochefoucald v Boustead [1897] 1 Ch 196, CA (refd)
Swiss Bank Corpn v Lloyds Bank Ltd [1979] 2 All ER 853, Ch D (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Wilkins and others v Kannammal (F) and Anor [1951] MLJ 99, CA (refd)
Yard v Yardoo Pty Ltd [2007] VSCA 35 (refd)
Yong Wee Ming v Chin Thian Guan [1984] 1 MLJ 236, FC (refd)
Vandervell's Trusts (No 2), Re [1974] 3 All ER 205; [1974] 1 Ch 269, CA (refd)

Legislation referred to

Companies Act 1965 s 131
Evidence Act 1950 ss 101, 102
Koperasi Pembangunan Desa (Sabah) Enactment No 15 of 1998
Limitation Act 1953 s 22(2)
National Land Code ss 89, 92, 92(1), 214, 221, 241, 283, 323(1)(6), 340, 344, 344(2)
Sabah Land Ordinance (Cap 68) ss 5, 6, 48, 57, 88, 104, 116, Schedule XiX
Securities Commission Act 1993 s 32B(1)(aa), (4)
Societies Act 1966

Tommy Thomas (Lau Mark Chi-Ming and Ravindran Shanmuganathan with him) (Sreenevasan Young) for the plaintiffs.
Wong Kian Kheong (Alex Tan Chie Sian and Wilson Lim Mao Shen with him) (Wong Kian Kheong) for the first defendant.
Richard Tee (Grace Chin with him) (Richard Tee & Chin) for the second, fifth and sixth defendants.
Teo Cheng Wee (Tan Yee Boon and WT Chan with him) (Khaw & Partners) for the third defendant.
David Lai (Frank Ch'ng & David Lai) for the fourth defendant.
Cheah Soo Chuan (Jasmine Ong with him) (Tay & Partners) for the seventh defendant.

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Porres P Royan (Lau Kee Sern and WT Low with him) (Shook Lin & Bok) for the eighth defendant.

Lim Yee Lan J:

THE PLAINTIFFS' PRAYERS/RELIEFS

[1] In this action the plaintiff ('ACCCIM') seeks in para F of the plaintiffs' amended statement of claim the following reliefs from the defendants:

(a) a declaration that the Sabah land is held in trust by the eighth defendant ('D8') and on behalf of ACCCIM;

(b) a declaration that each of the first to sixth defendants was required to act as trustee for and/or fiduciary of and/or nominee director for ACCCIM while exercising the duties of a director of Unico Holdings in so far as it was compatible with their duty to Unico Holdings;

(c) a declaration that each of the first to sixth defendants was required to act as trustee for and/or fiduciary of and nominee director for ACCCIM while exercising the duties as a director of Unico-Desa insofar as it was compatible with their duty to Unico-Desa;

(d) a declaration that each of the first–sixth defendants acted in breach of trust in respect of each or any one the corporate dealing in respect of Unico Holdings and Unico-Desa;

(e) alternative claim to prayer 4 above, a declaration that each of the first to sixth defendants acted in breach of trust in depriving Unico Holdings of its shares in Unico-Desa and/or diluting or reducing Unico Holdings equity in Unico-Desa;

(f) a declaration that each of the first–sixth defendants acted in breach of trust in acquiring whether directly or indirectly shares in Unico-Desa belonging to or were sold by Unico Holdings;

(g) a declaration that the first, third, fourth and fifth defendants acted in breach of trust in causing ELK-Desa Marketing Sdn Bhd (a wholly owned subsidiary of Unico-Desa) to sell 9,450,114 Unico Holdings shares and the first, third and fourth defendants acted in breach trust in acquiring those shares, either personally or through companies in which they have an interest, direct, indirect or deemed;

(h) a declaration that each of the first to sixth defendants acted in breach of their fiduciary and other duties to ACCCIM, Unico Holdings and Unico-Desa with regards to their conduct in respect of each or any one of the said corporate dealings;

(i) a declaration that each of the first ro sixth defendants acted in breach of

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s 131 of the Companies Act 1965 or otherwise in failing to disclose to the board of directors of Unico Holdings and Unico-Desa their personal interests in the various corporate dealings;

(j) an order that the first defendant be removed as the advisor and the fifth to sixth defendants be removed as directors of Unico Holdings Bhd;

(k) an order restraining Unico Holdings from appointing each of the first to sixth defendants as its director;

(l) an order that each of the first, third, fourth and fifth defendants be removed as directors of Unico-Desa;

(m) an order restraining Unico-Desa from appointing each of the first to sixth defendants as its director;

(n) a declaration that ACCCIM is entitled to appoint directors of its choice on to the board of directors of Unico Holdings so as to achieve and maintain at all times control of the said board;

(o) an order that Unico Holdings promptly takes all steps to implement the appointment by ACCCIM of directors on the board of directors of Unico Holdings;

(p) a declaration that ACCCIM is entitled to appoint directors of its choice on to the board of directors of Unico-Desa so as to achieve and maintain at all times control of the said board;

(q) an order that Unico-Desa promptly takes all steps to implement the appointment by ACCCIM of directors on the board of directors of Unico-Desa;

(r) a declaration that each of the first to sixth defendants is liable to make good and restore to ACCCIM all losses which have accrued or might accrue to ACCCIM by reason of their breaches of trust;

(s) an enquiry be ordered as to the loss to ACCCIM which have already accrued or may accrue by reason of the breaches of trust on the part of the first to sixth defendants and an order that such loss be made good by the said defendants to ACCCIM;

(t) alternative to (s) above, that each of the first to sixth defendant pay damages to ACCCIM and/or Unico Holdings;

(u) that each of the first to sixth defendants pay exemplary and/or aggravated damages to ACCCIM and/or Unico Holdings;

(v) an account be ordered as to the profit made by each of the first to sixth defendants in respect of the corporate dealings or otherwise resulting from their breaches of trust, and order that such profits as assessed by the court, be paid by the said defendants to ACCCIM;

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(w) that each of the first to sixth defendants pay interest on all sums ordered to be paid by this court for such period and such rate as this court determine; and

(x) costs to be paid by the D1–D6 to ACCCIM, Unico Holdings and Unico-desa on a solicitor and client basis.

UNDISPUTED FACTS

[2] The following facts are not in dispute between the parties:

(a) the fifth meeting of the 32nd Standing Committee of ACCCIM, at its meeting held on 18 May 1979 received a proposal for the establishment by ACCCIM of a RM100m Chinese Economic Development Fund;

(b) it was agreed that a company be registered pursuant to the Companies Act 1965 to raise funds for the fund and to involve in various major business activities and ACCCIM only plays the role of promoter in the launching of the fund;

(c) pursuant to ACCCIM's decision made on 22 March 1981, D7 was incorporated as a public limited company on 21 May 1981;

(d) the original subscribers of D7's shares were Tan Sri Wee Boon Ping, the then President of ACCCIM and Tan Sri Low Nam Hui, the then Deputy President of ACCCIM;

(e) the incorporation expenses of D7 were paid by Wee as preliminary expenses for D7, but D7 had subsequently reimbursed WBP of the same;

(f) the ACCCIM meeting held on 22 March 1981 was informed of a visit by Wee to the Chief Minister of Sabah, Datuk Harris Salleh ('PW1') and the Sabah Minister for Agriculture and Fisheries, Datuk Lim Guan Sing, to request the Sabah State Government to allocate to ACCCIM 20,000 acres of land in Sabah at a premium of RM50 per acre for the purposes of developing it into an oil palm plantation;

(g) the Chief Minister responded favourably to Wee's request, and he also suggested to Wee that a Sabah State agency like Koperasi Pembangunan Desa ('KPD') should also be involved in the business venture with ACCCIM;

(h) KPD is a statutory body incorporated under the provisions of the Koperasi Pembangunan Desa (Sabah) Enactment No 15 of 1998;

(i) on 11 December 1981, D8 was incorporated as a private limited company under the Companies Act 1965 D7 to implement the project between ACCCIM and KPD;

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(j) the subscriber shareholders and first directors of D8 were Datuk Wee and Dato' Low Nam Hui, with both holding one ordinary share of RM1 each in the D8. These two subscriber shares were subsequently transferred to the D7, thus resulting in D8 being a wholly owned subsidiary of D7 at the material time;

(k) vide a letter dated 14 December 1982 the office of the Chief Minister of Sabah wrote to KPD informing, inter alia, that the Sabah State Government had agreed to alienate certain lands totaling 7,920 hectares to KPD for the purpose of implementing the joint venture project between KPD and ACCCIM;

(l) by a memorandum of understanding dated 17 July 1981 ('MOU') between KPD and the ACCCIM, both parties agreed to develop cultivate and manage an agricultural plantation comprising an area of 20,000 acres or thereabouts ('the project') and to implement the project on a joint venture basis through a joint venture company;

(m) through letters dated 14 March 1983 and 21 March 1983 between D7 and KPD, it was agreed that the aforesaid lands of 7,920 hectares shall be alienated to and registered in the name of D8 instead of KPD;

(n) on 22 March 1983, an application was made to the Land and Surveys Department of Kota Kinabalu, Sabah for the alienation of the aforesaid lands of 7,920 hectares to D8;

(o) by a letter dated 11 May 1983, the Land and Surveys Department of Kota Kinabalu, Sabah made an offer to D8 to alienate approximately 17,000 acres of land situated at Kertam, Sabah ('the Sabah land') for a period from 1 January 1983 to 31 December 2081 under a state lease of 99 years for the purpose of cultivating oil palm and/or agricultural crop of economic value, subject to the terms and conditions appearing therein;

(p) by a letter dated 16 August 1983, D8 accepted the said offer of alienation of the Sabah land and paid a sum of RM212,500 being 25% of the total premium as was required by the Land and Surveys Department of Kota Kinabalu, Sabah;

(q) on 8 December 1983, a joint-venture agreement ('the JV Agreement') was entered into between D7 and KPD. Pursuant thereto:

(i) the paid up capital of D8 was increased from RM2 to RM10,000;

(ii) KPDH and D7 respectively subscribed 4,900 and 5,098 ordinary share of RM1 each of D8; and

(iii) D8 became 49% owned by KPD and 51% owned by D7;

(iv) on 16 July 1984, D7 (a public non-listed company) invited the public to subscribe a total of 49,404,998 ordinary shares of RM1

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each at a price of RM1 per share, the purposes of which were, inter alia, to develop the Sabah land and other projects undertaken or proposed to be undertaken at the material time by D79. Pursuant to this public offer, ACCCIM applied and was allotted 250,000 ordinary shares of RM1 each in D7;

(v) on 21 August 1987, a sale and purchase agreement and a deed of termination were executed between D7 and KPD pursuant to which, inter alia, D7 acquired all the shares held by KPD in D8. Consequently, D8 became a wholly-owned subsidiary of D7;

(vi) on 16 June 1989, the titles of the Sabah land were issued to and registered in the name of D8;

(vii) between 9 March 1994 to 12 May 1997, ACCCIM disposed of all its shares in D712. Since then, ACCCIM is no longer a shareholder of D7; and

(viii) on 1 April 1998, D8 was converted into a public limited company and assumed its present name.

[3] This is my finding and decision at the end of the trial.

[4] I will deal first with the prayer on the Sabah land. For convenience I shall refer to the plaintiffs as ACCCIM and the first to the eighth defendants as D1–D8 through out this judgment.

[5] Learned counsel for the plaintiff, Mr T Thomas, in para 177 of his written submission, submits that ACCCIM's claim over the Sabah land is an 'in personam' claim.

[6] Mr T Thomas submits that such an in personam claim does not affect the indefeasibility of the title of D8 in the Sabah land, reliance being placed on the decided cases of *Wilkins and others v Kannammal (F) and Anor* [1951] MLJ 99 (CA), *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 (PC), and *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449.

[7] Mr T Thomas further submits that such an in personam claim is premised on the concept of a resulting or constructive trust, reliance being placed on a number of English and Malaysian cases such as *Swiss Bank Corporation v Lloyds Bank Ltd and Others* [1979] 2 All ER 853 (on the meaning of an in personam claim), *Re Vandervell's Trusts (No 2)* [1974] 3 All ER 205; [1974] 1 Ch 269 and *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, (in which a resulting trust is said to arise in the circumstances of the transactions between the parties) and the cases of *Paragon*

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Finance plc v Thakerar & Co (a firm) [1999] 1 All ER 400, *Banner Homes Group PLC v Luff Development Ltd* [2000] 2 All ER 117, *McCormick v Grogan* (1869) LR 4 HL 82, *Rochefoucald v Boustead* [1897] 1 Ch 196 and *Pallant v Morgan* [1952] 2 All ER 951; [1953] Ch 43 cited in *Paragon Finance v Thakerar*, (in which the courts implied a constructive trust by nature of the transactions between the parties).

[8] All the defendants denied that ACCCIM that the Sabah land is held in trust for ACCCIM and learned counsel for all the parties have submitted at length on this issue which will be alluded to in the course of this judgment.

[9] Having anxiously considered the totality of the evidence adduced by the plaintiff through its three main witnesses, PW1, PW2 and PW3 and the defence witnesses (D1–D7) and the contemporaneous documents of both ACCCIM, D7–D8 adduced through them, the law relating to land ownership in Sabah as embodied in the Sabah Land Ordinance ('SLO') and the principles laid down in case law governing such ownership, this court comes to the conclusion and hold that ACCCIM has failed to prove on the standard of beyond reasonable doubt that it has a beneficial ownership over the Sabah land. My finding is based on the following grounds.

[10] It is trite that a person who asserts the existence of a certain set of fact bears the burden of proving it. Hence, in this case, the burden of proving that it owns a beneficial ownership over the Sabah land under a resulting or constructive trust falls on ACCCIM.

[11] This is clearly provided in ss 101–102 of the Evidence Act 1950 which requires no elaboration.

[12] I agree with learned counsel for the defendants that ACCCIM's burden of proving the existence of a trust over the Sabah land in its favour, is a heavy one: see *Choong Kwee Sang v Choong Kwee Keong (as the executor of the estate of Chan Fook Lon, deceased)* [2009] 1 MLJ 186 (CA) and the case of *Izzap Limited v Yeoh Jin Beng & Ors* (D8–22–111–2011, unreported, 5 January 2011).

[13] It is not in dispute that in the instant case the Sabah land comprises of seven pieces of land which were originally State Land of Sabah and were alienated to and registered in D8's name on 16 June 1989 under a 99 years state lease pursuant to ss 48 and 57 of the SLO, such alienation to take effect from 1 January 1983 and to expire on 31 December 2081 (see the titles found in PBD2 pp 342–373 at pp 346, 351, 360, 364 and 369).

[14] It is also not in dispute that land law governing land in Sabah is the

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Sabah Land Ordinance ('SLO') which, like the National Land Code ('NLC') in force in West Malaysia, is based on the Torrens system of land registration, albeit in a modified form.

[15] It is thus clear that any dispute relating to the Sabah land between ACCCIM and D8 has to be determined in the light of and in accordance with the provisions of the SLO.

[16] In this case, having seriously and carefully studied and examined the fundamental principles governing a Torrens system of land registration as practiced under the SLO (and the NLC which will be discussed together with the SLO wherever it is appropriate), it is my considered opinion that ACCCIM's claim of being the beneficial owner of the Sabah land under a resulting trust (which seems to have been abandoned along the way by learned counsel for the plaintiff in his submission) or a constructive trust, before its alienation and registration in D8's name is a misconception of the law.

[17] I start by discussing the Torrens system of land registration.

[18] Under the Torrens system of land registration, there are basically two main types of registration, namely, the primary and secondary registration.

[19] The primary registration focuses on the registration of a first or original title in respect of state or Crown land that has been approved for alienation or in respect of formerly unregistered land that has been brought under the Torrens system, while the secondary registration deals with the state's registration of instruments of dealing in alienated land in statutorily prescribed forms.

[20] A primary registration provides conclusive evidence that registration has taken place and the particulars of registration have been truly recorded and which no court is allowed to question. In particular, the matters enjoying conclusive proof include, (i) the registered title or registered interest (registered encumbrance) held in the registered land that is described in the relevant folio of the Torrens register; (ii) the person who is named in the folio of the title as a registered proprietor or, as the case may be, an existing registered encumbrance (lessee, chargee, or holder of an easement) of such registered interest; (iii) the fact that the land comprised in the registered title has been brought under the provisions of the Torrens statute; and (iv) the date and time of registration of the registered title (see p 291 paras [3.07]–[3.08] of the book *'The Torrens system and Equitable Principles'* by Mr SY Kok, published by Sweet & Maxwell Asia, September 2010), whose view I fully subscribe for reasons I shall explain later in this judgment.

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[21] In my view, the position of a Torrens system of registration under a primary registration is reflected in various provisions of the SLO and the NLC.

[22] In the case of the NLC, a primary registration and its effect is dealt with under s 89 which reads as follows:

(a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

(b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document;

[23] The secondary registration involves registration of dealings in respect of any land or interest therein on the title upon subsequent dealings by the registered proprietor of the land.

[24] A primary registration of a first Torrens title upon alienation grants to the registered owner a title that is immediately indefeasible as expressly provided in s 92 of the NLC and s 88 of the SLO, and as judicially interpreted in the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, at 20A and 26B-E (cited by learned counsel for the D1 in para 9 of his written submission).

[25] Section 92(1) of the NLC provides that:

> 92. (1) The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty.

[26] In the case of SLO, s 88 provides that:

> No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this part (Part V).

[27] Although s 88 does not expressly provide for the conclusiveness of the title of any land upon primary registration, its effect has received judicial interpretation by Edgar Joseph Jr FCJ in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, at 20A and 26B-E when he touches on the position under the SLO as follows:

> … unlike (NLC), there is no provision in the (SLO) conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration.

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> However, s 88 which emphasises the paramount importance of registration in accordance with Pt V of the (SLO) as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, in our view, imply the basic Torrens concept that *title to or interest in land vests and divests only upon registration*. Moreover, the provisions of s 116 of the (SLO) regarding the role of the caveat in giving notice of claim against the registered title point to the same conclusion. (Emphasis added).

[28] Hence in the case of the Sabah land, the registration of the title in the Sabah land in D8's name by the Sabah State Authority pursuant to the SLO under the relevant state leases vests conclusively in D8 the legal and beneficial ownership in the Sabah land which is immediately indefeasible against the whole world. Such a title upon registration cannot be questioned by any one and the court cannot go behind such a registered title to enquire or investigate as to the pre-registration arrangement between D8 and ACCCIM or as to the actual intention of the Sabah State Authority when alienating the land to D8.

[29] This has been succinctly laid down by the Federal Court in *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 (cited by learned counsel for the D1) where at 236I(left) and 237D(left), Seah FJ (as His Lordship then was) in delivering the FC's judgment said:

> … [T]he principle of indefeasibility of title conferred by registration under the Torrens system cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice.

[30] I now come to a secondary registration. As stated earlier, the second stage of registration of an alienated land involves registration of dealings in respect of any land or interest therein on the title upon subsequent dealings by the registered proprietor of the land.

[31] Incidentally, the types of dealings capable of being effected in respect of the land itself or any interest therein under the NLC are those provided in Division IV, ie transfer of the land itself (s 214), or grant of interest in the land such as leases (s 221), charges s 241 and easements s 283. Similarly under the SLO, the types of dealings in land or any interest therein capable of being registered under the Ordinance are provided in Part V s 104 of the Ordinance.

[32] A secondary registration of dealings similarly grants to the transferee, chargee or sub-lease a title or interest that is indefeasible, in the case of the NLC pursuant to s 340, and in the case of the SLO under s 88 as judicially interpreted in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd*,

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albeit it is subject to the statutory exceptions where fraud or misrepresentation was involved, or where registration was obtained by forgery or by means of an insufficient or void instrument.

[33] It is also clear from the NLC and the SLO that, in relation to dealings in a n alienated land, the only 'interest' capable of registration are leases, charges, liens and easements under Division IV of the NLC and charges, sub-leases under s 104 of the SLO.

[34] Under the Torrens system of land registration, a trust is an unregistered unregistrable interest that exists only outside the Torrens system. Thus, an 'interest' created under a trust is incapable of registration. This is based on the Torrens principle that a trust document cannot be registered and can only exist off the Torrens register.

[35] Nevertheless such an unregistered unregistrable interest can be protected against a subsequent registered statutory title or encumbrance that is being acquired by a bona fide purchaser for good value, by the entry of a protective device (caveat) (see p 380 para 3.85 of the book *'The Torrens system and Equitable Principles*')', see also the case of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (FC)(cited by learned counsel for D8).

[36] Section 116 of the SLO (and s 344 of the NLC) permits a *cestui qui trust* to protect his or beneficial interest in the trust land via the entry of a caveat.

[37] Under the NLC, it would appear that there are two ways of bringing a trust onto the registered title of an alienated land. One is on an application made by a settler or trustee pursuant to s 344(2): see *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 (PC) at p 46E.

[38] The other is by an application by the a person who claims to be beneficially entitled under a trust pursuant to s 323(1)(b) of the NLC (see p 450 para [4.57] of the aforementioned book *'The Torrens system and Equitable Principles*').

[39] In the case of the SLO, s 116 and Schedule XIX thereof would seem to imply that the application for the entry of a caveat is to be done by the beneficiary under the trust.

[40] In the light of the salient principles governing a Torrens system of land registration as enshrined under the SLO (and the NLC) as discussed above, it is my considered opinion that ACCIM's claim of a beneficial ownership over the Sabah land and a declaration sought from this court in respect thereof based

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on some equitable trust is misconceived, for the following reasons:

(a) firstly, such a prayer by ACCCIM by reference to some pre-alienation and pre-registration arrangement between ACCCIM, KPD, D7 and D8 in relation to state land is repugnant to the principle of state sovereignty in state land as enshrined in s 5 of the SLO which vests all state land in the Sabah State Authority. I fully agree with Mr KK Wong, learned counsel for the D, in his submission that under the SLO, as against the state, no private individual can acquire, even in equity, any title to state land otherwise than by way of one of the methods of disposal effected by the state authority — see FC's decision in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123;

(b) I further agree with Mr KK Wong, for the reasons given in his written submission, that the SLO does not contemplate the creation of any trust or equitable interest in any state land prior to the registration of alienation of the said land. In other words, no one can claim to have some beneficial interest in state land under the guise of a trust before its alienation so as to bind the state to alienate the land in which the registered owner will hold the land subject to a trust on behalf of another person; and

(c) this position is also echoed by the learned author in the aforesaid book '*The Torrens system and Equitable Principles*', in which in the course of discussing the various differences between a primary and secondary registration under the Torrens system, he has opined in the following manner:

> [3.42] The fifth difference relates to a claim to or a dealing with State or Crown land. Just prior to the primary registration of a first Torrens statutory title to State or Crown land that has been approved for alienation, there cannot exist at law a claim to such State or Crown land and the Registrar must not allow any entry of a caveat against the subject land prior to the completion of its alienation. But on the other hand, when land has been alienated or when unregistered land has been brought into the Torrens system and is dealt with by the registered proprietor but the transaction has not reached the post-registration stage, the corresponding party may enter a caveat to protect his or her claim to that proprietor's registered title or interest, as the case may be. In such circumstances, the Registrar may entertain an application for an entry of a caveat after he has registered the first land title …;

[41] Now coming back to ACCCIM's case before me, it is clear that the evidence of PW1, PW2 and PW3 regarding the arrangement between D7, D8 and KPD on the Sabah land relate to events that occurred before the registration of the Sabah land in D8's name while it was still state land, ie some

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pre-registration arrangement or intention on the part of the state authority, ACCCIM and KPD, D7 and D8 while the land was still state land.

[42] It is my considered opinion, that having regard to the exclusive sovereignty over state land by the Sabah State Authority as provided in ss 5–6 of the SLO and the evidential aspect of a primary registration under the Torrens system of land registration in s 88 of the SLO as discussed above, ACCCIM's claim of having a beneficial interest/ownership over the Sabah land upon the primary registration of its title in D8 under an equitable trust premised upon events that occurred before the primary registration of the title in D8 by the Sabah State Authority, based on some pre-registration arrangement or intention of the Sabah State Authority, would fly in the face of these principles as discussed:

(d) secondly, it is my considered opinion that ACCCIM's claim of beneficial interest/ownership over the Sabah land, based on some equitable principles of a resulting or constructive trust, strikes at the very core of the integrity of a Torrens system of land registration as enshrined in various provisions of the SLO and which forms the bedrock of the Torrens title as enshrined in s 88 of the SLO. In particular, such a claim runs counter to the two most fundamental principles which underpin a registered title under the Torrens system of land registration as discussed above, that of indefeasibility and conclusiveness of a registered title as enshrined in s 88 of the SLO;

(e) thirdly, such a declaration prayed for by ACCCIM also runs counter to the provisions of the SLO relating to the unregistrable and unregistered nature of a trust whose only recognition on the Torrens register of title is through the protective mechanism in the form of a caveat as provided in s 116 of the SLO as discussed above; and

(f) Hence, the only way ACCCIM can get its trust in the Sabah land recognised and protected under the SLO is by the entry of a caveat under s 116 of the Ordinance subsequent to its registration in D8's name. Thus, learned counsel for the plaintiff's submission of an in personam claim in the form of an equitable trust without recourse to the protective mechanism provided in the SLO for the protection of such a trust is misconceived.

[43] Based on the foregoing discussions, I therefore hold that as a matter of law, no trust existed in favour of ACCCIM in respect of the Sabah land immediately before the registration of the state leases in the name of D8 on 16 June 1989.

[44] On the contrary, I am inclined to the view that having regard to the factual matrix that occurred prior to and post-alienation and post-registration

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of the Sabah land in D8's name, ACCCIM's allegation of a trust in its favour in respect of the Sabah land is wholly inconsistent with (a) undisputed contemporaneous documents, (b) ACCCIM's own conduct and statements and (c) the circumstantial evidence available in this case.

[45] In the alternative, I agree with learned counsel for the defendants that even if a trust did exist in favour of ACCCIM over the Sabah land immediately upon its alienation, such a trust has been extinguished or lost or given up by ACCCIM through laches, acquiescence or is time-barred under s 22(2) of the Limitation Act.

[46] Without wishing to subtract from the submissions of respective learned defence counsel for the defendants, I wish to highlight some of the salient points raised by the defendants which support the contention that no trust in the Sabah land could have ever existed in ACCCIM as follows:

(a) the application for the Sabah land was made by D8, in the name of D8, and for and on behalf of D8, and not ACCCIM;

(b) the Sabah land was alienated to and registered in the name of D8, and not ACCCIM;

(c) the correspondence in relation to the Sabah land were between KPD and D7 and/or D8 and not ACCCIM;

(d) the purchase consideration for the Sabah land, the premium, the quit rent, the cess charges were paid either by D7 or D8;

(e) ACCCIM did not contribute any money towards the development and cultivation of the Sabah land;

(f) there is nothing in the memorandum and articles of association of D8 which states that the assets of D8 are held on trust for ACCCIM, or that disposal of such assets is subject to ACCCIM's approval;

(g) there is nothing in the annual reports of D8 which state that the Sabah land was held on trust for ACCCIM;

(h) ACCCIM has never in any of its annual accounts submitted to the registrar of societies ('ROS') disclosed its beneficial interest in the Sabah land, or that the Sabah land was held on trust for it;

(i) despite amendments to its Constitution to enable it to hold property or engage in business activities in 1979, ACCCIM never took steps to register or secure its alleged beneficial interest in the Sabah land;

(j) ACCCIM has never entered a caveat on, or registered its equitable interest in, the Sabah land in the Sabah Land Registry after its alienation;

(k) during the public share subscription campaign for D7 between June and

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September 1984, it was represented or made known to the public that the land was registered and legally and beneficially owned by D8;

(l) there was no mention in the prospectus of D7 dated 16 July 1984 that the Sabah land registered in the name of D8 was in fact held on trust for ACCCIM;

(m) there was no mention in the circular of D7 dated 6 September 1999 regarding the listing of D8 that the Sabah land was held on trust for ACCCIM;

(n) there was no mention in the prospectus of D8 dated 29 February 2000 prior to its listing that the Sabah land registered in the name of D8 was in fact held on trust for ACCCIM; on the contrary, it was represented to the public that the Sabah land belonged to D8;

(o) there were no complaints by ACCCIM or its office bearers or trustees at the material time that D8's prospectus dated 29 February 2000 did not state that the Sabah land was held on trust for ACCCIM;

(p) there was no mention in the public statement issued by ACCCIM on 27 October 1999 that the Sabah land was held on trust for it;

(q) the new shareholders of D8 after D8's listing on KLSE in May 2000 were never informed at any material time that the Sabah land was in fact held on trust for ACCCIM;

(r) there is no documentary evidence stating or alluding to the fact that the Sabah land was held on trust for ACCCIM;

(s) prior to the filing of the suit ACCCIM has never written to D8 alleging that the Sabah land was held on trust by D8 for ACCCIM;

(t) even if it is true that ACCCIM could not directly venture into business at the time D7 was incorporated, this only further demonstrates that ACCCIM's intention was for the legal and beneficial interest in the Sabah land to be vested in D8 and not ACCCIM albeit with the hope that ACCCIM could control D8 through its shareholding in D7; and

(u) D8 started out as a joint venture company between D7 (not ACCCIM) and KPD. At the material time the Sabah land was alienated to D8, KPD could not possibly have agreed that D8, in which it had a 49% interest, was to hold the Sabah land on trust for ACCCIM.

[47] I agree fully with learned counsel for the defendants that it is manifestly clear from the above material facts that ACCCIM cannot possibly prove beyond reasonable doubt that it was the beneficial owner of the Sabah land and that the Sabah land was intended to be held on trust for it.

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[48] ACCCIM's actions (or lack thereof) are wholly inconsistent with such a claim. In this regard, ACCCIM is estopped from contending otherwise: see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC) at pp 344 and 346.

[49] This court must emphasise and note here that ACCCIM's alleged claim over beneficial ownership of the Sabah land is based on some familial ties between ACCCIM as the father, D7 and D8 as the son and grandson respectively. To my mind such a comparison is misplaced and misconceived and does not hold water in the context of a modern company whose management is to be strictly governed by its MA and AA and the law relating to companies and the principles derived through case law.

[50] I agree with the submission of learned counsel for D8, Mr Porres, that ACCCIM's argument vis a vis its relationship with D7 and D8 based on the analogy of a parent-child relationship appeals to emotion and emotion only. It is not principle and must give way to principle. It presupposes ACCCIM's expectation as opposed to intention: see the Australian case of *Yard v Yardoo Pty Ltd* [2007] VSCA 35 (unreported, 14 March 2007) and the *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126.

[51] I further agree with Mr Porres at para 64 of his submission as follows:

> Even assuming for a moment the parent-child argument merits consideration, one must then consider what ACCCIM as a 'parent' has done for the 'child' D8. As highlighted above, the evidence clearly shows that ACCCIM did not contribute a single cent to D8 for the purchase of the Sabah Land. It was D8 and not ACCCIM who paid the quit rent and cess charges on the Sabah Land all along. Bank loans were taken out by D8 and corporate guarantees were given by D8 and its directors. It is quite clear that for all intents and purposes, D8 was completely responsible for its own survival. That is so because when D8 was set up, there was no guarantee it would survive. As such, in the event D8 and its business failed, ACCCIM would incur no loss or liability. This conduct by ACCCIM clearly shows that it was not willing to assume any risk or liability in respect of D8. ACCCIM's actions in truth resemble that of an opportunist rather than a parent.

[52] I am also of the view that if a resulting trust or constructive trust exists in the Sabah land in favour of ACCCIM, there has not been a breach of the trust by D8.

[53] Firstly, it is noted that the exact nature of the trust claimed by ACCCIM over the Sabah land is uncertain and vague. Be that as it may, even assuming for a moment that a constructive trust did exist in favour of ACCCIM over the Sabah land, the question that arises is whether there has been a breach of the

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trust on the part of D8 in respect of its dealing with the Sabah land which would entitle ACCCIM to seek any equitable relief from the court?

[54] It is the claim of ACCCIM that its avowed purpose in acquiring the Sabah land from the Sabah State Government was for the benefit of the Chinese business community, of which many of its constituent members represent, to be commercially developed into an oil palm plantation through D8 which ACCCIM considers as its investment arm, to carry out that objective.

[55] It is also clear that one of the terms described in the State Leases of the Sabah land is that 'the land is demised herein expressly and only for the purpose of the cultivation of oil palm /or an agricultural crop of economic value'.

[56] It is not in dispute that the Sabah land since its alienation has been commercially developed into and remains an oil palm plantation, and until now remains the single most valuable asset of D8, which is a public listed company. Hence, D8 as the registered owner has dealt with the Sabah land in accordance with the objective and purpose for which it was acquired in accordance with the avowed wishes of ACCCIM and the conditions stated on its title. Where then is the breach of trust on the part of D8 or any unjust enrichment on the part of D8 in the operation of the oil palm plantation, for which ACCCIM is entitled to claim any equitable remedy against D8?

[57] Lest we all get carried away by the cases cited by learned counsel for the plaintiff in his submission in which a resulting and constructive trust was implied by the courts therein, a careful examination of the facts and circumstances in those cases showed that they differed greatly from the facts and circumstances in the present case.

[58] All these cases involved disputes arising from dealings in land between the registered proprietor and a third party, in which a resulting or constrictive trust over the land is claimed by the third party, and the court having examined the course of their dealing and the circumstances of the case, agrees that such an equitable trust ought to be implied against the registered owner, in order to enable the court to exercise its equitable jurisdiction to grant the necessary remedies and or reliefs sought for by the aggrieved party, whether in the form of restitution or rectification of the register.

[59] A reading of the judgments in those cases reveals that the fundamental basis for the court's exercise of its inherent equitable jurisdiction, in either implying a resulting or constructive trust in favour of the aggrieved party, is founded on the principles of equity and good conscience, so as to prevent the registered owner by his unconscionable conduct and wrong doing, from hiding

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behind his registered title to deny the legitimate right of a bona fide purchaser who has paid valuable consideration or contribution towards the acquisition of the said land. In *Eves v Eves* [1975] 1 WLR 1338, Lord Denning stated that in such situations, it is good that the court exercises its equitable and inherent power to arrive at a just result so as to prevent any unjust enrichment on the part of the registered owner.

[60] Coming back to ACCCIM's case, there is no allegation that D8 has dealt with the Sabah land in any manner that is inconsistent with the conditions under which it was alienated by the state government.

[61] ACCCIM has also not provided an iota of evidence to the court of any adverse dealing by D8 of the Sabah land which is against equity and good conscience and which results in any unjust enrichment to D8 and its shareholders or its financiers viz a viz ACCCIM which calls for the court's intervention.

[62] There is also no accusation of any unconscionable conduct on the part of D8 or its shareholders or financiers by ACCCIM which requires this court's intervention to grant ACCCIM the remedy it seeks.

[63] As stated earlier, the consideration for the alienation of the Sabah land, ie the premium, the quit rent, the cess charges were paid either by D7 or D8. ACCCIM also did not contribute any money towards the development and cultivation of the Sabah land.The development costs of the Sabah land into a oil palm plantation was borne by D8's shareholders through public subscription of D7 and D8 shares and through borrowings from financial institutions as indicated by the four charges registered on the state leases of the Sabah land.

[64] The financiers gave loans to D8 on the basis of the registered titles and interests recorded on the titles with no knowledge of the alleged trust held by ACCCIM. Why should their registered right/interest acquired for valuable consideration in the form of a charge be defeated or affected by some fiction of a trust set up by a stranger, ie ACCCIM.

[65] While I am in agreement that one must not and cannot disregard or diminish the role or contribution played by ACCCIM in the acquisition of the Sabah land, nevertheless, it is also important to note that a constructive trust is not imposed whenever 'justice and good conscience' requires it. I agree with Mr Porres, learned counsel for the D8, that it must be done so on a principled and not on an arbitrary basis. As Deane J observed in *Muschinski v Dodds* (1985) 62 ALR 429 at p 452:

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> [T]here is no place in the law of this country for the notion of 'a constructive trust of a new model' which, 'by whatever name it is described, is imposed by law whenever justice and good conscience 'require it'. Under the law of this country — as, I venture to think, under the present law of England, proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' and 'the formless void of individual moral opinion' …

(See also *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 (HL) at p 1762).

[66] Indeed any declaration of such a trust over the Sabah land in favour of ACCCIM would be inequitable and unjust to D8, D8's shareholders and financiers and would result in unjust enrichment on the part of ACCCIM.

[67] This court also notes that it is unclear what is the in personam claim that ACCCIM is trying to enforce or pursue against D8 by this action.

[68] As stated by Justice Browne — Wilkinson (as he then was) in *Swiss Bank Corporation v Lloyds Bank Ltd* (cited by the plaintiff's counsel in his written submission):

> Historically the courts of equity acted in personam. Whether equity was supplementing the common law by giving additional remedies or correcting the common law by imposing a different legal result, the courts of equity intervened by directing the defendant personally to do, or refrain from doing, a specific act. In deciding whether or not to intervene, the courts of equity required, first, that the plaintiff should have some enforceable right and, secondly, that the conscience of the defendant was affected in some way so as to make the failure of the defendant to give effect to the plaintiff's rights contrary to justice.
>
> The rights which the plaintiff asserted were normally either contractual rights or rights under a trust. In the realm of contracts equity supplemented the common law by ordering the party in default to perform the contract, instead of merely paying damages. In the realm of trusts equity ordered the legal owner of property, the trustee, specifically to carry out the trust which he had accepted. In matters involving property equity intervened by ordering that the defendant do deal with the property in question in a specific manner, whether the plaintiff's rights were founded in contract or trust.

[69] However, curiously in this action, ACCCIM seeks no remedy or relief from D8 for any alleged breach of trust. Indeed, ACCCIM in its press statement issued on 9 October 2008 categorically stated that it is merely a procedural requirement to name D7 and D8 as defendants, based on legal advice. However no relief is sought in the proceedings against D7 and D8. PW2 admitted during cross-examination that ACCCIM had never clarified, retracted or withdrawn ACCCM's press statement.

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[70] In other words, ACCCIM is not seeking from D8 to account to ACCCIM for profits it has made from the operations of the oil palm plantation from the date of its commercial exploitation to the present date nor does it seek the dividends that it is entitled to as the alleged beneficial owner of the shares in D8 by virtue of its beneficial ownership in the Sabah land.

[71] It appears that viz a viz D8, ACCCIM would be satisfied with just a declaration that the land is held in trust for ACCCIM. As stated earlier, this prayer is the result of a misconception on the part of the ACCCIM that based on the cases it had relied on, an in personam claim in the form of an equitable trust can exist side by side and parallel to the registered title of the registered owner as appears on the register document of title without the protective mechanism of a caveat as provided in s 116 of the SLO.

[72] Hence, ACCCIM's prayer for a declaration that the Sabah land is held in trust for ACCCIM is frivolous, an exercise in futility and an abuse of the court process.

[73] Devoid of any beneficial interest in the Sabah land purportedly under a trust relationship, ACCCIM's sole status viz a viz D8 is nothing more than that of a shareholder. It is not disputed that as at 28 August 2008 ACCCIM holds 4,778,120 ordinary shares of RM0.25 each in D8.

[74] In this regard, it is also not in dispute that ACCCIM is a registered society under the Societies Act while D8 is a company incorporated under the Companies Act. Thus in law and in fact ACCCIM and D8 are two separate entities.

[75] One of the most fundamental and trite legal principles governing a company is that the assets of the company belong to the company and not its shareholders. As a shareholder, ACCCIM has no legal or beneficial interest in the company's assets: see *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at pp 626–627, followed by the Court of Appeal in *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97 at p 107 and *Law Kam Loy and Anor v Boltex Sdn Bhd and Others* [2005] MLJU 225; [2005] 3 CLJ 355 at p 359.

[76] In *Law Kam Loy*, Gopal Sri Ram JCA (as he then was) observed at p 359:

> The source of the confusion in the minds of the plaintiffs when pursuing their claim against the second to the sixth defendants is their oversight of the fundamental principle that a company is a separate entity distinct from its shareholders. The property owned by a company belongs to it and not to its shareholders. That

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proposition was established by the leading case of *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619 where Lord Buckmaster said:

> Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

ACCCIM'S OTHER CLAIMS AGAINST THE DEFENDANTS

[77] I now come to the various prayers sought by ACCCIM against D1–D6 in paras F(2)–(16) of its amended statement of claim. It would appear that these prayers are premised on the following grounds:

(a) ACCCIM is the beneficial owner of the shares in D7 and D8;

(b) D1–D6 were nominated to sit on the board of D7–D8 by virtue of their various positions as council members of ACCCIM and as nominees of ACCCIM they shall at all material times act as a trustees of and nominee directors for ACCCIM while exercising the duties of a director on the board of D7;

(c) as nominees of ACCCIM D1–D6 owe a fiduciary duty to ACCCIM when serving as directors of D7–D8;

(d) due to the special relationship between the ACCCIM, D7–D8, there developed a practice since the incorporation of D7–D8 that:

(i) ACCCIM's president would always be chairman of D7's BOD;

(ii) members of ACCCIM's Governing Council and other ACCCIM's office-bearers together with office-bearers of ACCCIM's constituent members, would be D7's directors on a rotation basis; and

(iii) ACCCIM would control board of directors of D7.

(e) in addition, there exists a social contract between ACCCIM and D7 which was given effect to by D7, in which, inter alia, a limitation is placed on the number of shares that D7 members would be permitted to own (*Share Limitation*):

(i) in the case of individual, the maximum was 50,000 shares; and

(ii) in the case of non-individual, the maximum was one million shares;

(f) ACCCIM alleged that in breach of the trust and fiduciary duties they owed to ACCCIM, the social contract between ACCCIM, D7–D8, D1

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and D6 had by a series of corporate dealings between them dealt with the shares in D7 and acquired majority shares in D7 to the detriment of ACCCIM.

[78] Having carefully considered the totality of the evidence adduced by all the parties through their witnesses except D8 who called no witness and the contemporaneous documents of both the plaintiff's and the D7–D8 on the facts alleged by the plaintiff, as well as the detailed submissions of respective learned counsel for all the parties on these allegations, I come to the conclusion and hold that ACCCIM has failed to prove any of its aforementioned allegations against the six defendants, on a balance of probabilities.

[79] It is not intended to reproduce the detailed, succinct and illuminating submissions of learned counsel for the defendants, suffice for me to state that, having regard to the law relating to companies as embodied in the Companies Act 1965 and the principles enunciated by case law on the various allegations raised by the plaintiff in its dispute with the defendants, in particular, duties of a director to the company, relationship of a nominee director and his nominee, ownership of the assets of a company, relationship between a director viz a viz the company and the shareholders of the company, the legal effect and nature of a memorandum of association and articles of association between the company, its directors and shareholders, and applying them to the available evidence before this court, I am satisfied that:

(a) in fact and in law ACCCIM has no beneficial interest in the shares of D7–D8;

(b) the alleged social contract did not exist and if it did exist in fact then firstly, it has been extinguished by subsequent events and secondly, it is not legally enforceable;

(c) there is no enforceable 'practice' in law and in fact that:

(i) ACCCIM's president would always be chairman of D7's BOD;

(ii) members of ACCCIM's Governing Council and other ACCCIM's office-bearers together with office-bearers of ACCCIM's constituent members, would be D7's directors on a rotation basis; and

(iii) ACCCIM would control board of directors of D7;

(d) D1 was not involved in the corporate dealings and the alleged corporate dealings did not breach any law; and

(e) in respect of the corporate dealings, I further agree with the D1–D8 that, in view that ACCCIM is not a shareholder of ACCCIM, it has locus standi and/or cause of action to claim for any remedy in respect of the corporate dealings.

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[80] In this regard, I accept counsel for D1's submission re paras 91–92 of his written submission that ACCCIM's action is not a derivative action by a minority shareholder against the company or those in control of the company.

[81] I further agree with said learned counsel that if a civil wrong has been committed against a company by those in control of that company (in this case D1–D6), a minority shareholder of that company (if ACCCIM is a shareholder of D7) may rely on the exceptions to the 'proper plaintiff rule' or the 'rule in *Foss v Harbottle*' and file a derivative action or a minority shareholder's action against the wrong-doers: see CA's judgment in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, at 422B, 426B-E and 426H-427F.

[82] For obvious reasons this action by ACCCIM is not a derivative action brought for the benefit of D7's shareholders. In *Abdul Rahim*'s case, at 431A it was held that:

> In our judgment, the derivative action has not reached a stage where a plaintiff may disregard its procedural elements. We emphasise that it is not permissible for a plaintiff in a derivative action to sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder.

[83] A perusal of the amended statement of claim (pp 1–45 in bundle A) will show that this action is not a minority shareholder's action brought for the benefit of D7 because:

(a) the amended statement of claim did not plead any facts coming within any exception to the rule in *Foss v Harbottle*;

(b) this action essentially prayed for remedies for the benefit of ACCCIM and not for D7. Please see prayers 1–3, 8 and 14–22 at pp 40–43 of statement of claim in bundle A; and

(c) ACCCIM's press statement dated 8 October 2008 which was made just after the filing of this action, clearly showed that this action has been filed for the benefit of ACCCIM.

[84] At this juncture, this court wish to observe that, as in the case of the Sabah land, ACCCIM's claim of beneficial ownership over the shares in D7 and D8 is substantially premised on the history and relationship between itself and D7 and D8.

[85] This court agrees with the defendants that if any familial ties between ACCCIM, D7–D8 did exist, it had been severed after the IPO of D7 and the public listing of D8.

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[86] It is my considered view that ACCCIM's claim of its control over D7, a public company and D8, a public listed company, is unfair to D8's non-Chinese shareholders who subscribed for and who paid valuable consideration for their shares in D7–D8 without the slightest knowledge of ACCCIM's alleged familial ties to D7–D8 and for whom such concepts as 'parent and child', 'members of the same family', 'social contract', 'deference to the senior', 'no need to stir the hornet's nest' and 'falling leaves always return to their roots' mean nothing and for which they are not bound thereby. These are moral values or ideals and not principle of law and must give way to principles.

[87] I fully agree with the defendants that to allow ACCCIM's claim of a constructive trust claim over the shares in D8 based on some familial ties would be contrary to public policy and commercial morality. It would effectively mean that for over ten years the public has been misled into investing huge sums of money into a public listed company whose main asset is in fact held on trust for another shareholder ie ACCCIM, whose investment in D8 may be negligible in comparison.

[88] This court also observes that learned plaintiff's purported comparison of ACCCIM's control over D7–D8 to the control of the government over a government linked company ('GLC') is misconceived. This is because as far as GLCs are concerned, the government either holds a controlling stake or a 'golden share' in these companies. In this case, ACCCIM does not hold a controlling stake or 'golden share' in D7–D8. The MA and AA of both D7–D8 do not provide for any controlling stake or 'golden share'.

[89] It is to be emphasised that D8 is a public listed company. If ACCCIM indeed holds a controlling stake or 'golden share' in D8, this means that ACCCIM was involved in the submission of false or misleading information to the Securities Commission in D8's prospectus concerning D8's shareholding under the then s 32B(1)(aa) read with s 32B(4) of the Securities Commission Act.

[90] In the premises and for the forgoing reasons I hereby dismiss ACCCIM's claims against the defendants with costs.

[91] I shall now hear each respective counsel on the quantum of costs to be paid by ACCCIM to each of the defendants.

Claim dismissed with costs.

Reported by Kanesh Sundrum